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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 17

THE UNITED STATES, PETITIONER,

v.

ALFRED C. BERGH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENTS, BERGH, et al.

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BRIEF FOR THE RESPONDENTS, BERGH, et al.

QUESTION PRESENTED

Whether the Joint Resolution of June 29, 1938 (52 Stat. 1426, 5 U.S.C. 86(a) operates to repeal the Joint Resolution of January 6, 1885 (23 Stat. 516, 5 U.S.C. 86), to the extent that the latter Resolution requires the payment of a so-called holiday gratuity allowance to federal per diem employees in addition to their ordinary compensation for work performed on a holiday occurring on a regular work day.

STATEMENT OF THE CASE

The Statement contained in the Brief for the Petitioner (p. 4) is adequate for purposes of this review.

SUMMARY OF ARGUMENT

The precise issue in this case, as indicated by the "Question Presented" set forth above, has been twice submitted to the United States Court of Claims and has twice been adjudicated in respondents' favor. The reasoning which has moved that Court to so conclude is as follows:

I. The 1885 Resolution, by its language and by over fifty years of administrative application, operates to provide a gratuity pay allowance to federal per diem employees for certain indicated holidays, and this allowance is payable whether or not work happened to be performed on that holiday. For work actually performed on a holiday the per diem employees were paid their regular compensation, and, in addition, received the gratuity holiday allowance. Thus, the obligation to pay the holiday gratuity has no relation to whether work was or was not performed.

II. The Government contends that the 1938 Resolution operates to repeal all prior holiday pay statutes, including the 1885 Resolution under which respondents make claim, so that at present a holiday gratuity is payable only in the single instance of where the employee has lost his day's pay because the occurrence of the holiday in itself prevented him from working. Respondents' answer is that there is nothing in either the language or the legislative history of the 1938 Resolution to warrant such a reading of the Resolution or such a conclusion as to its purpose. On its face the Resolution merely operates to amend the 1885 law in two narrow respects: (1) It permits holiday pay for holidays on which no work is performed, but only if employees were prevented from working because of the occurrence of the holiday itself, and (2) it permits holiday pay for holidays that have been administratively decreed in addition to holidays that have been statutorily decreed. That Resolution is completely silent on the subject of gratuity pay for holidays on which work was in fact performed, and this Court has already so construed the 1938 Resolution in *United States* v. *Kelly*,

342 U.S. 193. So read (and there is nothing tortuous in such a reading which follows from the literal language of the Resolution), there is no inconsistency with the 1885 Resolution insofar as the 1885 Resolution grants holiday pay allowances in addition to regular compensation for holidays actually worked where such holidays occur on a regular working day.

Furthermore, the 1938 Resolution does not contain any language which repeals the 1885 Resolution in so many words, as might be expected if the contention of petitioner was correct. On the contrary, in the 1938 Resolution it is expressly stated that the 1885 Resolution is repealed *only* to the extent of any inconsistency.

Finally, the construction of the 1938 Resolution contended for by petitioner will produce extremely absurd and inequitable results, one of which has already been noted by this Court in the *Kelly* case, and another of which is that the per diem employee who refrained from working on a holiday occurring on a regular work day would receive the same pay as the per diem employee who worked on that day.

III. The legislative history of the 1938 Resolution shows no intention whatsoever to repeal the 1885 Resolution in its entirety or to touch in any way upon the long-standing practice of paying a gratuity allowance in addition to the regular compensation on holidays actually worked. That history shows conclusively that the Congress was concerned with only two problems, namely, the problem of paying gratuity pay on holidays even though the employee would not otherwise have worked, and the problem of equating Presidentially as distinguished from statutorily-declared holidays. Furthermore, the contention of petitioner that Congress intended the 1938 Resolution to equalize the holiday pay status of per diem and per annum employees in all respects finds no support in the legislative history and is entirely without substance on the merits in view of the

various other differentials between per annum and per diem employees in this respect that the 1938 Resolution leaves untouched.

IV. Petitioner's argument that the wartime policy of requiring employees to work on days normally observed as holidays deprived per diem employees of the right to gratuity pay is both without merit and irrelevant to the issue in this case. The wartime policy upon which petitioner relies was promulgated by memoranda sent to heads of the executive departments by the Administrative Assistant to the President. Clearly, this policy, effectuated in 1943, has no significance in determining what Congress intended when it enacted the 1938 Resolution five years earlier, during a period of peace. In any event, the memoranda did not affect the right of per diem employees to gratuity pay provided by statute. The memoranda merely informed the heads of executive departments that no holidays, with the exception of Christmas, would be declared by executive action during the war period. As a result there were no holidays, with the exception of Christmas, for per annum employees because their holidays are declared by executive action. However, the memoranda could not affect the rights of per diem employees because their holidays as well as the gratuity pay are allowed by statute.

ARGUMENT

The Government argues in substance that the Congressional Joint Resolution of 1938 operates by its express terms, and as further demonstrated by its legislative history, to repeal in its entirety the Joint Resolution of 1885 which granted federal per diem employees certain gratuity pay allowances for holidays and under which respondents herein make claim. The Government adds as further grounds for rejection of respondents' claims the fact that the claims were made in respect to holidays worked during the period of World War II when Government employees were required by executive decree to work on all holidays

except Christmas. The United States Court of Claims carefully considered and rejected these precise contentions of petitioner not only once but in two separate decisions, in the latter of which the Chief Justice joined although he had dissented from the first.[1]

In determining the error in petitioner's position, it is necessary to bear in mind the exact question which lies at the heart of this case and which has been resolved by the Court below adversely to the Government. That question is not, as framed by the petitioner herein (Brief, p. 2), whether federal per diem employees are entitled to an extra day's pay for work on holidays during the period of World War II when such holidays were made regular working days by administrative decree. Rather, the question is whether the Congressional Joint Resolution of 1938, enacted almost five years prior to World War II and upon which the Government relies exclusively as statutory reason for denial of such extra day's pay,[2] has as its purpose and effect the repeal of existing statutory law (the Joint Resolution of 1885) which had been consistently construed and applied to require the payment of holiday pay allowances in addition to their regular compensation to per diem employees who were required to work on holidays. Talk, therefore, of wartime requirements for work on holidays is entirely immaterial, and the Government's stressing of the wartime factor is, as will be indicated later in this brief, entirely misplaced.

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[1] *Kelly* v. *United States*, 119 C. Cls. 197; *Bergh* v. *United States*, C. Cls. —, 132 F. Sup. 462, and reproduced herein at R-13.

[2] At no time in its arguments before the Court of Claims, *i.e.*, either in the *Kelly* case or in the present one, did the Government contend that the May 12, 1943, directive of the President, requiring holiday work during the war period, operated in itself to repeal the 1885 Joint Resolution. It is fundamental that the Executive may not overrule the express or implied will of Congress respecting the status, tenure or compensation of federal employees, at least those on the employment level of the claimants herein. *Roth* v. *Brownell*, 215 F. 2d 500; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579.

I.

THE JOINT RESOLUTION OF 1885 GRANTED GRATUITY PAY ALLOWANCES TO FEDERAL PER DIEM EMPLOYEES FOR HOLIDAYS, WHETHER WORKED OR NOT, IN ADDITION TO REGULAR COMPENSATION FOR HOLIDAYS ACTUALLY WORKED.

It is important to note that the 1885 Resolution not only "allowed" certain holidays but also provided for the payment of gratuity pay to federal per diem employees on those days regardless of whether they worked or did not work. It did not attempt to prescribe the rate of pay for holiday work; it merely declared that on the prescribed holidays a gratuity allowance equal to a regular day's compensation would be forthcoming.

The 1885 Resolution reads as follows:

> ". . . the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The first day of January, the twenty-second day of February, the day of each year which is celebrated as 'Memorial' or 'Decoration Day', the fourth of July, the twenty-fifth day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days."

Entirely apart from the foregoing provisions, if a per diem employee worked on a holiday, he would, of course, receive his regular compensation for working at whatever rate might be called for under his employment relationship with the Government. Thus in the present case the respondents were paid their regular day's wages for their work on the holidays herein involved and make no claim for that; they ask only for the gratuity allowance which is made payable generally on holidays to all per diem workers under the provisions of the Joint Resolution of 1885.

This Court, when it had occasion to consider in the *Kelly* case [3] the effect of a similar 1895 Resolution relating to employees of the Government Printing Office found that law to be "consistently administered as providing for gratuity pay in addition to regular compensation if the employees worked on a holiday" (342 U.S. at 194).[4] The construction given the 1885 Resolution by the Comptroller General of the Treasury (13 Comp. Dec. 40) is further illuminating. He held in respect to the 1885 and 1895 Acts as follows:

> "These statutes allow or grant to certain employees of the Government the holidays specified with regular pay. The pay is not for service performed or labor performed, but is a gratuity. It is not intended that the employees shall perform any service for the pay given them by these joint resolutions. The pay has no relation to work. If the public interests require that these employees shall work on the stated holidays and they do work, then if they receive only the pay given by the joint resolutions they have not been paid for their labor, but have received merely the gratuity which they were entitled to without working. They are, therefore, entitled to pay at the rate of their regular per diem pay for work on the holidays in addition to the gratuity pay given them by the statutes referred to; that is, to double the amount of their regular per diem pay when they work all day."

The reasoning of the Comptroller General's decision which refused to stultify the grant of Congress was confirmed in *Emmett L. Adams* v. *The United States,* 42 C. Cls. 191, 212 (1907). In that case the court pointed out that "when the statute declares certain days to be holidays and

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[3] *United States* v. *Kelly,* 342 U.S. 193.

[4] Although this Court made such determination in respect to the Act of 1895 (28 Stat. 601, 607, par. 46), that Act, relating to Government Printing Office Employees, was the exact counterpart of the Joint Resolution of 1938, and this Court cited opinions of the Comptroller of the Treasury construing the 1885 Resolution to grant gratuity pay. (8 Comp. Dec. 322 (1901); 13 Comp. Dec. 40 (1906); 3 Comp. Gen. 411 (1924).)

provides that certain employees shall receive the same pay as on other days, they are thereby exempt from work, with pay, on such days." Thereupon, the court concluded that if such employees were required to work on such days, they would be entitled to their regular rate of pay in addition to the gratuity pay provided by statute.

The reason which presumably induced Congress and the Government to grant gratuity pay to per diem employees on holidays when they did not work is that annually-paid employees continued to receive their compensation for holidays on which they did not work; the reasons which induced Congress and the Government to pay per diem employees this gratuity in addition to their regular compensation for holidays on which they did work are well set forth by petitioner in its brief (p. 35) where it is stated:

> "Holiday work is more onerous and burdensome than work on a regular week day. A holiday is a day for religious, patriotic, or recreational pursuits. Assignment to holiday work involves on the part of the employee a departure from the normal way of living. These considerations justify payment of premium pay to those Federal employees who are required to work when other Federal employees are excused from work and allowd to enjoy an uninterrupted holiday without loss of pay."

The basic question in this case is whether in 1938, when Congress passed its Joint Resolution relating to holiday allowances, it intended to repudiate the above considerations and to repeal the 1885 Resolution as well as the more than fifty years practice of paying per diem employees who worked on holidays the gratuity allowance in addition to their regular compensation when such employees worked on a holiday which was also a regular working day. We turn now to that question.

II.

THE 1938 RESOLUTION DOES NOT OPERATE, EITHER UNDER ITS TERMS OR BY REASON OF ITS LEGISLATIVE HISTORY, TO REPEAL THE 1885 RESOLUTION TO THE EXTENT THAT THAT RESOLUTION AUTHORIZED GRATUITY PAY IN ADDITION TO REGULAR COMPENSATION FOR WORK PERFORMED ON HOLDAYS OCCURRING ON A REGULAR WORKING DAY, NOR IS IT INCONSISTENT THEREWITH.

A. READ LITERALLY, OR BY ITS TERMS, THE 1938 RESOLUTION DOES NOT REPEAL THE 1885 RESOLUTION.

The 1938 Resolution reads as follows:

> "Whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive Order, or any other day on which the departments and establishments of the Government are closed by Executive Order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.
>
> "Sec. 2. The joint resolution of January 6, 1885, U.S.C., title 5, sec. 86, and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict." (c. 818, 52 Stat. 1246, 5 U.S.C. § 86a.)

The 1938 Resolution, read literally, operates simply to amend the 1885 law in two respects: (1) It permits holiday pay for holidays on which no work is performed, but only if employees were prevented from working because of the occurrence of the holiday itself, and (2) it permits holiday pay for holidays that have been administratively decreed in addition to holidays that have been statutorily decreed.

Thus, there is nothing in the literal language of the 1938 enactment which is in any way inconsistent with the Act of 1885 to the extent that the Act of 1885 requires premium pay for holidays occurring on a regular work day and on which work is actually performed, and, of course, there is nothing in the language of the 1938 Resolution either directly or indirectly repealing such requirement for premium pay for holidays actually worked. Of even greater importance is the fact that the 1885 Resolution nowhere speaks of what result should obtain when services are in fact performed on a holiday; as expressly found by this Court in the *Kelly* case (342 U.S. at 194), the 1938 Resolution is "silent on the subject of gratuity pay for holidays on which work was performed."

Even though the 1938 Resolution deals only with the subject of holidays on which no work is performed, from this fact the petitioner would draw the conclusion that the Resolution intended to deal with the whole subject of holiday pay and to limit such pay to the one instance specified, namely, a holiday on which no work is performed. Aside from the entire absence of any indication of such an intent in the legislative history of the 1938 Resolution (see *infra*, p. 15), the principal difficulty with such a reading of the 1938 Resolution is that, in arriving at the conclusion that Congress was eliminating all gratuity pay except in the one instance set forth in the Resolution, petitioner somehow incorporates the phrase "shall make gratuity payments *only*" in that single stated instance. That phrase or words of equivalent substance or effect are not, of course, included in the Resolution, although Congress could easily have done so had it intended the very limited effect contended for by the Government. Surely, no Congress, presumably expert in the art of drawing statutes, would broadly dispose of the very important subject of gratuity pay for holidays actually worked by mentioning in the statutory language purportedly covering the whole subject of gratuity pay only the very narrow situation where an employee was prevented

from performing his regular work because of the occurrence of a holiday. Surely, if Congress had intended to treat other than the very narrow subject of gratuity pay in instances where no work was performed because of a holiday, it would have employed language of a more appropriate nature. On the other hand, in dealing only with the limited subject of compensation for being prevented from working because of a holiday occurring on a working day, leaving untouched the other aspects of gratuity pay, Congress did use language which was both apt and precise.

The fallacy of the Government's assumption that the 1938 Resolution repeals not only the 1885 statute but all prior holiday statutes in their entirety is clearly demonstrated in *John Di Benedetto* v. *United States,* 108 C. Cls. 18, 24, 25 (1947), cert. denied, 332 U.S. 763, which expressly recognizes that the 1885 Resolution was not superseded, but only modified by the 1938 Resolution. That decision establishes that the 1938 Resolution merely refers to statutory holidays, but does not in fact allow such holidays. Other holiday statutes *in pari materia,* such as the 1885 Resolution and the 1895 Act, *allow* the statutory holidays referred to in the 1938 Resolution.

Petitioner contends that since the 1938 Resolution is "clear and unambiguous" its meaning must be found only in the literal words of the Resolution. Read literally, the 1938 Resolution clearly applies only to the situation in which employees do not work on a holiday. As we have seen, and as this Court has found in *Kelly,* it makes no reference to gratuity pay when employees are required to work on a holiday. However, the 1885 Resolution provides gratuity pay to employees who are required to work on a holiday. Thus, if the 1938 Resolution is read literally, and "taken to mean just what it says", as Petitioner contends, it clearly has no application to the issue involved herein, and the 1885 Resolution governs the right of Respondents in this case. We repeat, if Congress had had any intention

whatsoever of terminating the long-standing practice of paying premium pay for holidays worked, it could easily have done so by express language directed to that end. That it did not use such language is significant.

Since the 1938 Resolution deals by its express terms only with the subject of pay when per diem employees are *prevented* from working because of the occurrence of a holiday, there is no call to broaden its scope to include by implication a direct prohibition against payment of gratuity pay in addition to regular pay when a per diem employee performs work on a regular work day. It has been many times determined by this Court that repeals by implication are not favored. See *Federal Trade Commission* v. *A.P.W. Paper Co.*, 338 U.S. 193; the general rule is that Congress will not be presumed to intend overturning long-established legal principles unless such intention is clearly evidenced by express declaration or necessary implication *Koenigsberger* v. *Richmond Silver Mining Co.*, 158 U.S. 41; *Scarborough* v. *Atlantic Coast Line*, 178 F. 2d 253. See also *Wisconsin* v. *Illinois*, 278 U.S. 367; *United States* v. *Johnson*, 173 U.S. 363; *First National Bank* v. *Missouri ex rel Barrett*, 263 U.S. 640; *Merritt* v. *Cameron*, 137 U.S. 542; *Dismuke* v. *United States*, 297 U.S. 167; *United States* v. *Citizens Loan & Trust Co.*, 316 U.S. 209. To the extent that the 1938 Resolution is not inconsistent with holiday statutes *in pari materia*, it must be presumed that it was enacted in accord with the legislative policy embodied in the 1885 Resolution and other holiday pay statutes, and effect must be given to all such statutes. *Sanford* v. *Commissioner of Internal Revenue*, 308 U.S. 39, 44 (1939). *Cf. Layne-Western Co.* v. *Buchanan County, Mo.*, 85 F. 2d 343, 346 (C.A. 8th, 1936).

B. THE REPEALER CLAUSE OF THE 1938 RESOLUTION DOES NOT REPEAL THE 1885 RESOLUTION IN ITS ENTIRETY, BUT ONLY TO THE EXTENT ~~LESS ENTITLED TO GRATUITY PAY.~~ of any inconsistency.

Nor can the Government take comfort in the repealer

clause of the 1938 Resolution (Sec. 2) which states that "The joint resolution of January 6, 1885 (I.S.C., title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict." First of all, it is to be noted that Section 2 repeals the Resolution of 1885 *only* to the extent of any inconsistency. Thus the general repeal clause of the 1938 Resolution repealed nothing that would not have been repealed without it. *Hoague-Sprague Corporation* v. *Frank C. Meyer Co., Inc.*, 31 F. 2d 583, 585, 586 (E.D. N.Y. 1929).

We have seen that the two statutes are not by their terms inconsistent or in conflict. If, as contended for by the Government in its brief (p. 16), it was the intent of Congress that the phrase in Section 2 "to the extent of such inconsistency or conflict" was not to be applicable to the language "the Joint Resolution of January 6, 1885" therein but rather only to the balance of Section 2, surely Congress would have worded Section 2 more appropriately, as, for instance, by expressly stating that the Joint Resolution was repealed in its entirety, but that all other holiday pay laws were repealed only to the extent of any inconsistency. See, again, the decision of the Court of Claims in the *Di Benedetto* case, *supra*.

C. EVEN ASSUMING THAT THE RIGHT OF PER DIEM EMPLOYEES TO GRATUITY PAY MUST BE DETERMINED SOLELY BY REFERENCE TO THE 1938 RESOLUTION, AS PETITIONER CONTENDS, SUCH EMPLOYEES REQUIRED TO WORK ON STATUTORY HOLIDAYS ARE NEVERTHELESS ENTITLED TO GRATUITY PAY.

Normally, a holiday is considered a "day of exemption from labor or work", or as a "day fixed by law for the suspension of business in whole or in part". (Webster's New International Dictionary, Second Ed. Unabridged, 1948.) It is contemplated that the departments and agencies of the Government will be closed on such days. (See Ismar Baruch, Federal Holiday Pay Policies, Vol. 8, *Personnel*

Administration, p. 15.) Under the 1885 Resolution which "allows" the holidays referred to in the 1938 Resolution, employees are both "relieved" and "prevented" from working. This principle was established fifty years ago by the Comptroller General of the Treasury. In his 1901 decision (8 Comp. Gen. Treas. 322) he stated:

> "The act of 1895, *supra,* granting certain holidays to the employees of your office with pay does not confer any discretion upon you. The act is self-executing. When one of those holidays arrives, it is only a question as to whether a person is an employee of your office on that date. If he is, the law does the rest. It grants him a holiday with pay. *It is not within your power to compel him to work on such a day unless such work is a matter of public necessity, nor is it within his right to perform his ordinary duties, unless such are works of necessity on that day, and claim pay for such ordinary day's work. . . .*" (Emphasis supplied.)

Under the 1885 Resolution, if an employee were required by the necessities of the situation to work on a holiday, he obviously was not "allowed" the holiday. Nevertheless, he received his gratuity pay in addition to his pay for hours of actual work. Because the term "relieved or prevented" merely describes the consequences of being "allowed" a holiday, it is apparent that the 1938 Resolution is consistent with the 1885 Resolution with respect to payment of gratuity pay when wage rate employees are required to work on a statutory holiday. Thus, under the 1938 Resolution, if an employee is not "relieved or prevented from working", on a holiday which is allowed him, because the necessities of the situation require him to work on that day, he is similarly entitled to his gratuity pay. In the complete absence of any evidence of a contrary legislative intent it should be presumed that Congress intended to continue this traditional construction of provisions of prior holiday statutes. *United States* v. *Missouri Pac. R. Co.,* 278 U.S. 269; *United States* v. *Jackson,* 280 U.S. 183.

D. THE LEGISLATIVE HISTORY OF THE 1938 RESOLUTION INDICATES NO INTENT TO REPEAL THE 1885 RESOLUTION IN ITS ENTIRETY, BUT ONLY TO QUALIFY THE GENERAL BODY OF FEDERAL HOLIDAY PAY STATUTES IN TWO NARROW RESPECTS, BOTH OF WHICH ARE UNRELATED TO THE PAYMENT OF GRATUITY PAY FOR WORK PERFORMED ON HOLIDAYS OCCURRING ON REGULAR WORKING DAYS.

The legislative history of the Joint Resolution of 1938 is completely lacking in any indication whatsoever of an intent to abolish the 50-year practice of paying a gratuity allowance for holidays worked, nor indeed does that legislative history reveal even the suggestion of a complaint that it was inequitable or uneconomical or otherwise improper for the federal government to pay its per diem employees premium pay when work was performed on holidays.[5]

Far from the legislative history revealing any intent to repeal the 1885 enactment, that history reveals conclusively that Congress, in passing the 1938 Joint Resolution earlier in this brief, was concerned *solely* with the two problems mentioned *supra* on p. 9, namely, the problem of giving the same status for gratuity pay purposes to holidays established by executive order as to holidays established by statute, and the problem of eliminating a situation under which a per diem employee, although not called to work, re-

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[5] It is significant that at the time the 1938 Resolution was enacted it was the general practice of private industry to pay some type of premium pay for holidays worked, and, as pointed out by Judge Madden in the majority opinion in the *Kelly* case, 119 Ct. Cls. 197, at 207, "in no case which we have heard of, or can imagine, could an employer maintain a practice whereby an employee who worked on a holiday received merely the same pay as one who did not work." The only available study for the period immediately preceding 1938 which is in any way illuminative of the situation respecting the payment of extra pay for holidays worked is that of F. Beatrice Brower for the National Industrial Conference Board, New York City (1937), "Personnel Practices Governing Factory and Office Administration." The study covered some 350 industrial concerns. The report found that over 60 per cent of these companies paid some type of premium or gratuity to their employees for work performed on holiday, the extra pay varying from one and one-quarter times the regular rate up to double time.

ceived gratuity pay on holidays which fell on a day such as Sunday when the employee would not have worked in any event.

The 1938 Resolution was brought into existence to correct an injustice to wage-rate employees which grew out of an Executive Order, dated December 6, 1937, excusing federal employees from duty on December 24, 1937.[6] Since the Executive Order failed to provide pay for the holiday, wage rate employees lost their wages for the day. To remedy this situation, Representative Ramspeck introduced a Resolution[7] in the House of Representatives, providing compensation for such employees who were excused from duty on that day. This Resolution was referred to the Committee on Civil Service. The Committee was advised by the United States Civil Service Commission that "there is the broader question involved of securing statutory authority for such payments as a general practice and thus obviate the necessity for special resolutions by Congress." H.R. Rep. No. 2683, p. 2. Petitioner relies upon this statement in support of its contention that Congress intended a broad general revision of holiday pay practices in the federal government. It is clear, however, that the Commission's statement fails to support petitioner's contention since it refers solely to the recurring problem of Executive Order holidays and merely suggested amending the Resolution so that it would cover future similar situations.

The immediate purpose of the 1938 Resolution was to eliminate the loss of wages by wage rate employees caused by uncompensated Executive Order holidays. This intent is readily apparent from the following colloquy between Mr. Ramspeck and Mrs. Rogers on the floor of the House during passage of the Joint Resolution. 83 Cong. Rec. 9466 (1938):

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[6] Executive Order No. 7763, dated December 6, 1937; see H.R. Rep. No. 2683 (1938), 75th Cong., 3rd Sess.

[7] H.J. Res. 551 introduced on January 5, 1938.

"MR. RAMSPECK: This covers the lowest-paid group of employees in the Government service. It is those who work on a per diem basis. For instance, last Christmas Eve the President excused all Government employees from rendering any service. His Executive Order, of course, applied to every employee in the Government service. Those who are working on a monthly salary got their pay for Christmas Eve, but those who work on a per diem were forced to take the day off, and they lost the day's pay. This is simply to correct that situation.

"MRS. ROGERS: This simply prevents an unintentional discrimination.

"MR. RAMSPECK: That is correct. The per diem employees are unintentionally discriminated against."

Prior to the 1938 Resolution, there was no statute which provided gratuity pay for Executive Order holidays or days when the Government departments were closed by Executive Order. In addition to providing gratuity pay for Executive Order holidays for wage rate employees, the 1938 Resolution also increased the number of employees entitled to such pay. It covered all regular wage rate employees of the federal government as compared with the more limited scope of prior holiday statutes.[8] Thus, it is clear that, far from a purpose *to abolish*, the primary purpose was *to broaden* the scope of prior holiday statutes.[9]

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[8] The 1885 Resolution was limited to employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving and other per diem employees in the United States. Temporary per diem employees and per diem employees whose duties were not in a recognized trade or craft were excluded from its benefits. The 1895 Resolution covered only employees of the Government Printing Office. 14 Comp. Gen. 818, 820 (1935); 16 Comp. Gen. 912 (1937).

[9] H.R. Rep. No. 2683, 75th Cong., 3rd Sess. 2 (1938) contains a letter from Harry B. Mitchell, President of the Civil Service Commission, to Congressman Ramspeck, which states: "It is believed that the President had in view that the benefits of the holiday be accorded to all classes of employees to the greatest extent possible."

Petitioner contends that Committee Report No. 2683 establishes that Congress intended to deprive wage rate employees of gratuity pay when required to work on a statutory holiday. To support its conclusion, petitioner refers to certain passages appearing in the Acting Comptroller General's letter to the Secretary of the Navy, which was included in the Committee Report. Petitioner emphasizes that the letter points out in two places that wage rate employees required to work on a holiday receive "double pay". It relies upon such references as evidence of a legislative intent to deprive wage rate employees required to work on a holiday of their gratuity pay. Examination of the references upon which petitioner relies reveals that petitioner is confused with respect to one reference (H.R. Rep. 2683, p. 4) and inaccurate with respect to the other (H.R. Rep. 2683, p. 5). The reference on page 4 of the Report refers to the right of wage rate employees "to extra pay at a higher rate for all services rendered outside of regular business hours. . . ." Obviously, this reference is to premium or overtime pay as distinct from gratuity pay. The other reference on page 5 of the Report, upon which Petitioner relies, reads as follows:

> ". . . when any of such holidays falls on a nonwork-day (such as a Saturday), such employees receive pay for the holiday when no work is performed thereon, in addition to the full week's pay otherwise earned, and double compensation for the day if work is performed thereon."

It is clear that this passage does not refer to gratuity pay for wage rate employees required to work on a statutory holiday occurring on a *regular work day*. The reference to "double compensation" relates to the payment of such compensation to wage rate employees required to work on a statutory holiday occurring on a *nonwork* day. Clearly, if gratuity pay is eliminated for statutory holidays occurring on nonwork days, the employee required to work on

such days would not receive "double compensation", but would merely receive his regular rate of pay for the day. Thus, it is apparent that the Committee Report did not, as petitioner contends, specifically deal with the subject of gratuity pay for employees required to work on statutory holidays occurring *on regular work days.*

The significance of the phrase in the 1938 Resolution, "Whenever . . . employees . . . are relieved or prevented from working solely because of the occurrence of a holiday" must be viewed against the background of the affirmative policy of Congress to improve substantially the holiday pay status of wage rate employees and to remedy discrimination against them as reflected in Committee Report No. 2683, p. 22. Conceding that the phrase is a limiting one, the extent of the limtiation must be derived from an examination of the cause which inspired it as revealed by the available legislative material. The scope of such limitation is readily perceived in Committee Report No. 2683, which establishes that the phrase is merely intended to limit holiday gratuity pay to holidays which occur on regular work days. The letter from the Acting Comptroller General contained in Committee Report No. 2683, pages 3-5, pointed out in the language quoted above that under existing holiday statutes wage rate employees were entitled to gratuity pay for holidays which fell on nonwork days. The quotation from this letter continues as follows:

> "During the calendar year 1936 navy yard per diem employees, as well as other per diem employees of the Government to whom the 40-hour-week statute is applicable, were paid 3 days gratuity pay under the holiday statutes, over and above their full earnings for the year, by reason of the fact that February 22, May 30, and July 4, 1936, fell on Saturday nonwork days. (See 15 Comp. Gen. 700; *id.* 809.) It is noted in this connection that December 25, 1937, and January 1, 1938, each will fall on a Saturday."

The legislative history of the 1938 Resolution is wholly devoid of any evidence that Congress intended any limitation of gratuity pay granted by prior holiday statutes other than the elimination of gratuity pay for holidays occurring on nonwork days. Thus it is apparent that petitioner seeks, without basis, to extend the scope of the limitation to deprive respondents of their right to gratuity pay when required to work on a statutory holiday occurring on a regular work day. The court below rejected petitioner's contention with the following quotation from that court's language in the earlier *Kelly* case, *supra:*

> "One has immediate doubts as to whether Congress, in 1938, intended to take away from this class of Government employees these rights which they had enjoyed at least since 1895. And when one examines the origin and purpose of the legislation, he finds not the remotest intimation of any such intent. The resolution as originally introduced provided merely that per diem employees should be paid for the December 24, 1937, special holiday. It was amended so that it would serve as permanent legislation for all such occasions. The Civil Service Commission and the House Committee in enlarging the scope of the resolution obviously had noted the Comptroller General's comment, quoted in the committee report, that the existing legislation had been so interpreted as to give employees pay for a holiday coming on a day when they would not have worked anyway. To prevent that unduly generous treatment, the language 'whenever . . . employees . . . are relieved or prevented from working solely because of the occurrence of a holiday' was inserted. The words were apt for that purpose. Hence we are not asked by the plaintiffs to disregard, or nullify, words of a statute on the ground that Congress used them inadvertently. They had a purpose and were, for that purpose well chosen. We are asked only to hold that they should not be given an additional application, which, taken literally, they could receive, when all the indications are that they were not meant to have it.
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> "This being the situation, we think that the administrative officers of the Government and the courts have no duty, and indeed no right, to attribute to Congress an intention which, it is morally certain, Congress did not have, by giving to words which Congress used for one obvious purpose, an additional application which, taken literally, they might support. The evil which Congress meant to cure by the words it used, it cured. The additional effect contended for by the Government would destroy a practice which no one had ever even intimated to be an evil, and which responsible officials had, for more than forty years regarded as just and necessary."

E. THE CONTENTION OF PETITIONER THAT CONGRESS INTENDED THE 1938 RESOLUTION TO EQUALIZE THE HOLIDAY PAY STATUS OF PER DIEM AND PER ANNUM EMPLOYEES IS WITHOUT MERIT AND FINDS NO SUPPORT IN THE LEGISLATIVE HISTORY.

Petitioner contends that Congress intended to deprive wage rate employees of their traditional right to gratuity pay when required to work on a holiday occurring on a regular work day in order "to equalize the position of per diem and per annum workers with respect to holiday pay". The court below in the *Kelly* case, *supra,* disposed of that contention in the following language:

> "The Government suggests that the fact that per annum employees, at that time, received no extra pay when they were required to work on a holiday was a discrimination, which the Government's interpretation would eliminate. But that difference had existed for some forty-five years, no mention had been made of it in connection with this legislation, and there is no basis whatever for thinking that Congress intended to treat it. It was apparently a recognized difference between the status of a per annum employee with his relatively secure tenure, and a per diem craftsman."

Not only is there a complete absence of evidence in the legislative history to support petitioner's argument that the 1938 Resolution was enacted to equalize the holiday status of per annum employees with wage rate employees,

but the expressed legislative purpose of the 1938 Resolution was to prevent "an unintentional discrimination" against "the lowest-paid group [wage rate] of employees in the Government Service." These two factors demonstrate that there is no basis in the legislative history of the 1938 Resolution to support petitioner's argument.

Petitioner's assumption that Congress intended to equalize the holiday pay status of wage rate and per annum employees is predicated upon an erroneous conception that wage rate employees in fact enjoyed preferential treatment as compared with per annum employees. On the contrary, at the time of the enactment of the 1938 Resolution, the Government's over-all compensation policy for holidays and other nonwork days was substantially superior for per annum employees. In 1938, per annum employees were paid for every day of the year, and could be required to work on all Saturdays, Sundays and holidays (Digest of Provisions of Law Fixing Pay for Employees in the Executive Branch of the Federal Government, at p. 93). However, most per annum employees were not required to work beyond their regular work week. On the other hand, in 1938, wage rate employees were not paid for nonwork days such as Saturdays or Sundays,[10] unless required to work on such days. Indeed, in the case of many hourly rate employees, there is no guaranteed work week and they may be laid off with only part of a day's earnings because there is insufficient work to keep them occupied for a full day. Thus, a discrimination existed, in fact, in favor of per annum employees.

Petitioner's argument also presumes that there is a single holiday pay standard which Congress sought to achieve by the simple expedient of depriving wage rate employees of gratuity pay when required to work on a statutory holi-

[10] The sole exception was the occasional instance when wage rate employees received gratuity pay when a statutory holiday occurred on a nonwork day.

day. It assumes that all federal employees are divided into two general classifications, per annum employees and wage rate employees. Further, it assumes that all per annum employees are treated similarly with respect to holiday compensation, and that the same is true for all groups of wage rate employees. Petitioner fails to recognize that with respect to holiday pay practices as well as general employment conditions federal employees have traditionally been classified into numerous groups without uniform treatment. In a report by the Hoover Commission [11] concerning federal personnel pay practices, this lack of uniformity was clearly pointed out in the following language:

> "While 92 percent of all federal positions are subject to the same employment regulations, only 42 percent are subject to any single set of pay policies. In fact, federal employees fall into five distinct groups for pay purposes, and each group is subject to widely different policies.[12]

The wide variations in holiday pay practices among various groups of federal employees are described by Ismar Baruch in *Federal Holiday Pay Policies, Personnel Administration*, Vol. 8, pp. 15, 17, as follows:

> "In the Federal Service, the statutes are not uniform on this point. Some groups are granted premium pay for holiday work; some are permitted compensatory time off in lieu of extra pay; and some receive only the

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[11] *Task Force Report on Federal Personnel* prepared for the Commission on Organiation of the Executive Branch of the Government, January, 1949, pages 43, 44. See also page 57.

[12] The five groups are listed as follows: (a) Classification Act (white collar) employees; (b) Wage Board (blue collar) employees; (c) Postal Service employees; (d) special legislative employees; custom clerk; Foreign Service; Immigration Inspectors; (e) excepted employees (R.F.C. and T.V.A., etc. employees).

same pay for holiday work as they would receive if they were officially excused from working on a holiday.[13]

The lack of uniformity in holiday pay practices and other employment conditions referred to by Mr. Baruch and the Hoover Report exists among various groups of per annum employees as well as among groups of wage rate employees.

Not only were there differences in holiday pay practices among various groups of wage rate employees [14] but there are also wide differences among different groups of per annum employees. For example, certain per annum employees of the Treasury Department required to work on a holiday in 1938 were entitled to three times their basic rate of compensation for such days of work.[15] Others, such as per annum employees of the Superintendent of Documents, receive the same compensation for work on holidays as is ". . . allowed . . . [wage rate] employees of the Government Printing Office. . . ." [16]

The court below in the *Kelly* case pointed out that the foregoing differences in holiday pay practices as well as differences in conditions of employment among the various groups of federal employees had existed for many years. Indeed, Congress still recognizes that differences in premium and holiday pay practices exist. The Committee on Post Office and Civil Service of the United States Senate, in its report on the Federal Employees Pay Act of 1952 recommended that:

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[13] The extent of the widely varying holiday pay practices applicable to Federal employees is also readily perceived from an examination of Part VIII of *The Digest of Provisions of Law Fixing Pay for Employees in the Executive Branch of the Government, supra*, at pp. 93-98.

[14] For example, the 1895 Act grants a statutory holiday (Inauguration Day) to employees of the Government Printing Office which has not been allowed *by statute* to any other wage rate employees up to the present.

[15] Act of February 13, 1911, c. 46, § 5, 36 Stat. 901, U.S.C. 26.

[16] Act of March 4, 1925, c. 549, § 1, 43 Stat. 1300, 44 U.S.C. § 73.

> "Development of a single overtime, night, and holiday pay plan for application throughout the Federal service would be undesirable at this time. So long as fundamentally different base pay plans exist, it is logical to continue correspondingly different premium pay plans.[17]

Since a subsequent Senate Committee recognized that the development of a uniform holiday pay plan today would require consideration of numerous interrelated factors such as base pay differences only after a thorough study, it is illogical to assume that Congress would have sought to "equalize" the holiday pay status of all federal employees in 1938 without either Committee Hearings or reference thereto in the Committee Report.

III.

THE GOVERNMENT'S CONSTRUCTION OF THE 1938 RESOLUTION WOULD PRODUCE ABSURD AND INEQUITABLE RESULTS.

While, as noted by the Government in its brief (p. 33), the Comptroller General may in practice apparently authorize payment of a full day's wages even though only a part of a day is worked, query whether this ruling of the Comptroller General is valid if the 1938 Resolution is to be given the construction contended for by the Government or is to be read as literally as the Government would have it read. Thus, the possible absurdity mentioned by this Court in *Kelly*[18] is still relevant. In any event, there are other equally if not more absurd results consequent upon the Government's reading of the 1938 Resolution. One of these results is already manifested in decisions of the Comptroller General following the 1938 Resolution. See Decision A97265, August 29, 1938, which holds that an employee who was not required to work on a designated holiday oc-

[17] Committee Report No. 843, 82d Cong., 1st Sess. (1951), page 3.
[18] *United States* v. *Kelly*, 342 U.S. 193, at 194, footnote 4.

curring on a workday must nevertheless show facts and circumstances to prove that he would have worked but for the sole fact that it was a holiday. In other words, under the Government's interpretation, unless an employee is in fact ready, willing, and able to go to work on the designated holiday, he is not entitled to gratuity pay, despite the fact that he was not required to work on that day. Furthermore, it is to be noted that under the Government's construction of the 1938 Resolution and under the ruling of the Comptroller General in the present case, an employee who is required to work on a holiday occurring on a regular workday receives the same pay as but no more than the employee who stays at home. Certainly it is not to be presumed, without very clear language or without a very clear expression of intent in the legislative history, that Congress was desirous of bringing about such an obviously inequitable result. This Court will not construe statutes to produce absurd or inequitable results. *Helvering* v. *Hammel*, 311 U.S. 504, 511 (1941); *United States* v. *Katz*, 271 U.S. 354, 362.

IV.

THE COMPTROLLER GENERAL'S INTERPRETATION OF THE 1938 RESOLUTION AND THE ANNOTATION IN THE UNITED STATES CODE RELATIVE TO THE 1938 RESOLUTION ARE ENTITLED TO NO WEIGHT.

The Comptroller General's interpretation of the 1938 Resolution is entitled to no weight because it is predicated upon the erroneous assumption that the 1938 Resolution flatly repealed holiday statutes *in pari materia* which grant gratuity pay.[19] It has been demonstrated that the 1938 Resolution merely modified prior holiday statutes *in pari materia* and did not repeal them. See *John Di Benedetto* v. *United States, supra.* The law is settled that statutes in

[19] 18 Comp. Gen. 191, 192 (1938).

pari materia must be construed together, giving effect if possible to the legislative policy embodied in those prior statutes. Thus, it is evident that the Controller General's decision are entitled to no consideration because they made no effort to reconcile the provisions of the 1885 Resolution and the 1895 Act with the 1938 Resolution.

Petitioner claims that the interpretation of the 1938 Resolution of the House Committee on Revision of Laws, as reflected in the annotations to 5 U.S.C. 86 and 44 U.S.C. 44 in the 1940 edition of the United States Code are entitled to great weight. There is no merit to this contention because the Committee does not purport and has no authority to construe statutes.[20]

In *Murrell* v. *Western Union Tel. Co.*, 160 F. 2d 787, 788 (C.A. 5th, 1947), the court held as follows:

> "The United States Code was not enacted as a statute, nor can it be construed as such. It is only a *prima facie* statement of the statute law. The statutes collected in it did not change their meaning nor acquire any new force by their inclusion. *If construction is necessary,* recourse must be had to the original statutes themselves. Section 2(a) of the Act of June 30, 1926, 44 Stats., Part I, Page 1." (Emphasis supplied.)

The cases relied upon by petitioner (Brief, pp. 34-5) to support its contention that the annotations are entitled to great weight do not support its contention. Those cases merely hold that where there is no inconsistency between the United States Code and the Statutes at Large, the Code shall constitute *prima facie* evidence of the law.

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[20] The House Committee on Revision of Laws merely supervised the consolidation of the Code. "The actual work of preparing and editing the material . . . was done by the West Publishing Co. . . . and the Edward Thompson Co. . . ." Preface to 1946 Ed. page IX, United States Code.

V.

THE WARTIME POLICY REQUIRING GOVERNMENT EMPLOYEES TO WORK ON HOLIDAYS DOES NOT DEPRIVE WAGE RATE EMPLOYEES OF THEIR RIGHT TO GRATUITY PAY ALLOWANCE WHEN REQUIRED TO WORK ON STATUTORY HOLIDAYS.

Petitioner claims that the court below overlooked the fact that the holidays involved herein occurred during the war period (Pet. Br. 35). It asserts that the promulgation of a wartime policy of requiring employees to work on days normally observed deprives Respondents of their right to gratuity pay. However, petitioner fails to show that the wartime policy is relevant to the issue in this case. Clearly, this policy, promulgated in 1943, has no significance in determining what Congress intended when it enacted the 1938 Resolution almost five years earlier, during a period of peace, and when the considerations justifying, indeed requiring, holiday pay allowances for per diem workers as enumerated on page 35 of petitioner's brief (set forth this brief, *supra*, p. 8) were entirely applicable.

The court below disposed of petitioner's "wartime policy" contention as follows:

> "The fact that during this period the Secretary of the Navy, in accordance with a directive of the President, issued a directive that holidays, with the exception of Christmas, be considered as regular work days, would have nothing to do with the issue here. If the Government required per diem employees to work on holidays it should pay for such services."

Further, as will be demonstrated hereafter, the wartime policy does not, in and of itself, bar the payment of gratuity pay to wage rate employees required to work on a statutory holiday. The memorandum of May 12, 1943, merely informed the heads of executive departments and agencies that "days normally observed . . . as holidays should with the excep-

tion of Christmas be considered as regular work days for the duration of the war."[21] On December 17, 1943, a similar memorandum was sent to heads of executive departments and agencies. This memorandum contained the observation that holiday work is performed by federal employees without additional compensation. These memorandum are the basis of the wartime policy upon which petitioner relies in support of its argument. However, the only significance of these memoranda is that they merely advised the executive heads of departments that days normally observed as holidays as a result of executive action, with the exception of Christmas, would be regular work days. Thus, for those per annum employees who normally received premium rates of pay for work on holidays, the basis of such payment was eliminated because holidays for per annum employees were not declared. The memoranda did not and could not refer to wage rate employees, because holidays for such employees are allowed by statute[22] as distinct from executive action.[23]

Petitioner argues that Respondents were not entitled to "premium pay" during the war period because normal

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[21] *Digest of Provisions of Law Fixing Pay for Employees in the Executive Branch of the Federal Government, supra,* at p. 94.

[22] See decision of the Comptroller General, 22 Comp. Gen. 1054, in which he pointed out that: "Presidential or administrative orders requiring work on legal holidays during the war emergency do not and cannot change the status of such [statutory] holidays for the purpose of applying statutes and regulations having the force and effect of law granting rights and benefits on the basis of the holidays."

[23] Petitioner Brief, p. 36) relies upon the Federal Employees Pay Act of 1945 to support its wartime policy argument. However, the Committee Report accompanying the Act conclusively establishes that Congress recognized that the only holidays allowed per annum employees were those provided by executive declaration. The report states at page 13, "As to any given holiday, it [Section 302 of the Act] could take effect earlier if the President has declared that such a holiday shall not be generally a work day in the Federal Service. Such a declaration already exists with respect to Christmas." H.R. Rep. No. 726, 79th Cong., 1st Sess.

peacetime holidays were converted into regular work days. Petitioner's argument is without substance because it wholly ignores the legal basis upon which wage rate employees are entitled to holiday pay with respect to the holidays involved in this case. Respondent submits that although the days normally observed as holidays were regular work days for per annum employees, such days were in fact statutory holidays for wage rate employees. In *Di Benedetto* v. *United States*, 108 C. Cls. 18, 24, 25 (1947), cert. denied 332 U.S. 763 (1947), the court pointed out that the 1885 Resolution is "limited to per diem employees" and had no "application to the plaintiff who is paid on a per annum basis."[24] The court stated at page 25 with respect to per annum employees:

> "There is no statute defining any day as a day on which they may not be required to work, or as a holiday for any purpose, in relation *to them* [per annum employees]. The days on which they have customarily been excused, before and since the war period have been determined by the executive branch of the Government." (Emphasis supplied.)

Although the court denied premium pay to per annum employees in the *Di Benedetto* case, it clearly indicated that if statutes allowing holidays for wage rate employees had also been applicable to per annum employees, the latter would have been entitled to premium pay. In any event, petitioner has already conceded that respondents are entitled to premium rates of pay for work on statutory holidays. Thus, it is clear that petitioner cannot now argue consistently that the wartime policy prohibits the payment of gratuity pay to wage rate employees.

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[24] The Government's Brief in Opposition to the Petition for a Writ of Certiorari in the *Di Benedetto* case, emphasized that the holiday statutes involved herein were not applicable to per annum employees, as distinct from wage rate employees.

CONCLUSION

For the reasons set forth in this brief, it is respectfully submitted that the decision of the court below should be affirmed.

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